Filed 6/29/10 P. v. Galloway CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PETER LEE GALLOWAY, Defendant and Appellant.	C061174 (Super. Ct. No. 07F06248)

Convicted of second degree robbery and sentenced to state prison, defendant argues on appeal that the judgment must be reversed because the trial court did not instruct the jury on the lesser offense of grand theft. We conclude that the evidence does not support defendant's argument that the trial court should have instructed on grand theft. Therefore, we affirm.

PROCEDURE

Defendant was charged by information with one count of second degree robbery. (Pen. Code, § 211.) The information

also alleged that defendant had two prior strikes (robbery and kidnapping) (Pen. Code, §§ 667, 1170.12) and two prior prison terms for other felonies (false impersonation and bank fraud) (Pen. Code, § 667.5, subd. (b)). Finally, the information alleged that the prior robbery was a serious felony within the meaning of Penal Code section 667, subdivision (a).

Before trial, the court granted the prosecutor's motion to strike the kidnapping prior.

A jury found defendant guilty of second degree robbery, and the court found the prior conviction and prison term allegations true.

The trial court imposed the upper term of five years in prison for the second degree robbery, doubled to 10 years because of the strike. The court added five years for the prior serious felony and one year each for the prior prison terms, all consecutive. The total state prison term imposed was 17 years.

FACTS

Defendant committed the crime at Nordstrom Rack in Sacramento on June 21, 2007. The two main sources of evidence against defendant were (1) two witnesses to the crime and (2) a surveillance video.

Testimony of Witnesses

Heather Djuric was acting as store manager on the evening of the crime. She was assisting a customer with a refund at a cash register near the front of the store. The customer gave Djuric her passport, from which Djuric entered information into the register. The cash register opened, and Djuric began taking

cash out of the drawer. As she did so, defendant collided with her and she was knocked to the ground, about four or five feet from the register. She landed on a divider between registers, resulting in injured ribs and a shoulder tear. In a daze, Djuric thought at first that another employee may have tripped and fallen into her.

Joshua Meredith, the store's loss prevention officer, saw defendant enter the cashiers' area, shove Djuric, and take money from the cash register. After a struggle, Meredith and others detained defendant until police arrived.

When interviewed by a sheriff's deputy immediately after the incident, Djuric said that she had been grabbed then shoved.

Surveillance Video

The surveillance video capturing the incident is about 70 seconds long. The view is of most of the cashiers' area, where there are four cash registers. Some of the immediate area outside of the cashiers' area is also visible. The camera looks down onto the cashiers' area, at an angle.

Inside the cashiers' area are two employees assisting customers, who are outside the cashiers' area. As the video begins, the employee on the left side of the image (identified at trial as Djuric) is typing on the keyboard of the cash register, while the customer she is assisting is looking at a shoe on the counter.

Fifteen seconds into the video, defendant appears, walking past the cashiers' area and talking on a cell phone. He walks around a display of clothing, then returns to the area just

outside the cashiers' area, behind Djuric's back. Still talking on the cell phone, defendant bends over, looking in the direction of Djuric for about 15 seconds.

Fifty seconds into the video, Djuric hands something to the customer as the cash register opens. As soon as the cash register opens, defendant, still outside the cashiers' area, walks toward the camera. He disappears from the camera image, which does not include one end of the cashiers' area.

Fifty-five seconds into the video, defendant appears inside the cashiers' area where Djuric is taking cash out of the register. Much larger than Djuric, defendant rushes in and, in one motion, knocks Djuric away from the cash register with his right forearm and grabs for cash in the register with both hands. Djuric crashes to the ground with considerable force, several feet from the register. The cash she has in her hand ends up on the floor behind her.

Sixty seconds into the video, defendant leaves the cashiers' area with cash from the register in his hands.

DISCUSSION

Defendant contends that the trial court should have instructed the jury on grand theft. We disagree.

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. *(People v. Benavides* (2005) 35 Cal.4th 69, 102.) A trial court must therefore "instruct fully on all lesser necessarily included offenses supported by the evidence." *(People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) "[T]he trial court

need not instruct on a lesser included offense whenever *any* evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury." (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4, italics in original.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*Id.* at p. 201, fn. 8.) "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

The difference between robbery and grand theft, at least under the facts of this case, is that robbery includes an element of force while grand theft does not. "Where the element of force . . . is absent, a taking from the person is only . . . grand theft[.]" (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) There is sufficient force for robbery if the defendant used "more force than necessary to accomplish the taking . . . or, stated another way, . . . defendant engage[d] in a measure of force at the time of taking to overcome the victim's resistance." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.)

At the jury instruction conference, defense counsel requested an instruction on grand theft. He argued that the evidence supported the instruction because there was an issue concerning whether the force that defendant applied to Djuric was sufficient to sustain a robbery conviction or, instead, was

merely incidental to the taking and, therefore, supported only a grand theft conviction.

The trial court ruled as follows: "The money was in no way attached to the person of the victim. When the Defendant entered the work station . . . , he basically, what, I believe it's his right forearm, shoved the victim in such a way so hard and so quickly that it knocked her 4, 5 feet to her right further down into the work station . . . . She was instantaneously removed from the area of the cash register when that occurred. Thereafter, the defendant scooped up money out of the till or the cash register where the victim had been working. And because of that fact situation I do not believe it lends itself to any reasonable argument that an instruction for grand theft person is appropriate . . . ."

During closing argument, defense counsel argued that the contact between defendant and Djuric was incidental because defendant may have tripped. On appeal, defendant's attorney adds that Djuric may have slipped. Based on these views concerning the facts, defendant contends that the evidence was sufficient to require an instruction on grand theft because there was some doubt concerning whether he applied force beyond that necessary to take the money. The flaw in defendant's contention is that, despite the trial and appellate arguments, the evidence simply does not support a factual finding that defendant did not intentionally apply considerable force against Djuric.

Djuric, stunned by the collision, thought that someone had tripped and fallen into her. But this perception was based on her mistaken belief that another employee had collided with her. Meredith, on the other hand, saw defendant enter the cashiers' area and shove Djuric. Meredith's version is the only version consistent with surveillance video. In that video, defendant enters the cashiers' area quickly, but not out of control, shoving Djuric and going for the money in the cash register in one motion. He is not regaining his balance through this motion. No reasonable jury would have found that defendant tripped or that the contact between defendant and Djuric was merely incidental to the taking.

Defendant argues that it is relevant to this analysis that Djuric's statements concerning the incident changed. First, she thought another employee had tripped and fallen into her. Then, she told police that she was grabbed and shoved. And finally, at trial, she stated that she was shoved. Contrary to defendant's argument, these variations in Djuric's account do not constitute sufficient evidence that the taking was accomplished without intentional force to overcome her potential resistance. As noted, there is no substantial evidence that defendant tripped and fell into Djuric. Also, the difference between being grabbed and shoved as opposed to simply being shoved is immaterial to the analysis. Either way, the quantum of force applied was consistent only with robbery.

Accordingly, we conclude that the trial court was correct in determining that the evidence did not warrant an instruction on grand theft.

Given this conclusion, we need not discuss the Attorney General's argument that the evidence did not support a grand theft instruction also because defendant did not take the money from Djuric's person.

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was required to register as a sex offender, committed for a serious or violent felony, and/or had a prior conviction(s) for a serious or violent felony. (Pen. Code, § 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

RAYE, J.